No. 06-[illegible] JAN 16 2007

In The

Supreme Court of the United States

BENITO MEZA-HERNANDEZ,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Benito Meza's removal hearing fall below the "minimum standards of legal justice?" *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

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OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported as *Meza-Hernandez v. Gonzales,* 2007 WL 466281 (10th Cir. 2007).

STATEMENT OF JURISDICTION

A panel of the Tenth Circuit entered its decision denying a petition from a final removal order of the Board of Immigration Appeals on February 14, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTES

8 United States Code section 1229b(b)(1) provides:

> (b) Cancellation of removal and adjustment of status for certain nonpermanent residents
>
> (1) In general
>
> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –
>
> **(A)** has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> **(B)** has been a person of good moral character during such period;

> **(C)** has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> **(D)** establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 United States Code section 1229a(b)(4)(B) provides:

> the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .

8 Code of Federal Regulations section 1240.1(c) provides:

> (c) *Conduct of hearing.* The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

STATEMENT OF THE CASE

Petitioner, Benito Meza-Hernandez, is a native and citizen of Mexico. He has been an undocumented worker and ranch hand in the United States since 1987. Except for a few years in Chicago, he has always resided on the western slope of Colorado with his wife and two children, both born in the United States. His daughter, Carina, is now 15 years old. His son, Michael, is now 9 years old. He was issued a Notice to Appear in Removal Proceedings on February 18, 1998. On February 8, 1999 he appeared before an immigration judge in Denver, Colorado and

applied for cancellation of removal for a non-permanent resident under 8 U.S.C. § 1229b(b)(1). The immigration judge denied the application, deciding that Mr. Meza had failed to prove sufficient *continuous presence* and the requisite *hardship* to his children. Mr. Meza timely appealed to the Board of Immigration Appeals on March 10, 1999. 8 C.F.R. § 3.1 (1998). The Board issued a summary affirmance without opinion on April 23, 2002. 8 C.F.R. § 3.1(a)(7) (2001). Mr. Meza then applied for a writ of habeas corpus in U.S. District Court in the District of Colorado on May 15, 2002. 28 U.S.C. § 2241. On February 23, 2006, before the habeas was decided, the case was transferred to the United States Court of Appeals for the Tenth Circuit, and thereafter it was treated as a petition for review of the Order of the Board of Immigration Appeals dated April 23, 2002. The transfer from District Court to the Tenth Circuit Court of Appeals was required under the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311. The Court of Appeals had jurisdiction to review constitutional claims raised in the petition for review pursuant to 8 U.S.C. § 1252(a)(2)(D). It dismissed Mr. Meza's petition for review on February 14, 2007, holding that his constitutional claim was without merit. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) and 8 U.S.C. § 1252(a)(2)(D).

ARGUMENT

Introduction To The Question Presented

The Fifth Amendment entitles Mr. Meza to due process of law in his removal proceeding. *Reno v. Flores,* 507 U.S. 292, 306, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). In immigration court Mr. Meza was applying for cancellation

of removal for a non-permanent resident. 8 U.S.C. § 1229b(b)(1). His application was denied because he could not prove sufficient *continuous presence* and the requisite *hardship* to his United States citizen children. The proof hinged on Mr. Meza's testimony, yet the immigration judge failed to make any credibility finding.

Instead, the immigration judge tacitly credited parts of Mr. Meza's testimony that could be used against him, but other parts of the same testimony favorable to Mr. Meza were tacitly discredited. This credibility "procedure" fell below the minimum standards of legal justice.

The immigration judge's failure to make any credibility finding whatsoever should create a "presumption of credibility," in which case Mr. Meza's application would be granted. *See, e.g., Iao v. Gonzales,* 400 F.3d 530, 534 (7th Cir. 2005) (when an immigration judge says not that he believes or he disbelieves the reviewing court is left in the dark as to whether the testimony was not credible). *Canjura-Flores v. INS,* 784 F.2d 885, 888-89 (9th Cir. 1985) (where immigration judge makes no credibility finding then credibility is presumed).

There Is A Conflict Among The Circuit Courts As To The Minimum Standards Of Legal Justice Required In A Removal Hearing

The Courts of Appeals do not agree on what constitutes the minimum standards of legal justice for an immigration removal hearing. For example, in *Benslimane v. Gonzales,* 430 F.3d 828 (7th Cir. 2005), the Court stated as follows:

> In the year ending on the date of the argument, different panels of this court reversed the Board

of Immigration Appeas in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent. Our criticisms of the Board and of the immigration judges have frequently been severe. E.g., *Dawoud v. Gonzales,* 424 F.3d 608, 610 (7th Cir.2005) ("the [immigration judge's] opinion is riddled with inappropriate and extraneous comments"); *Ssali v. Gonzales,* 424 F.3d 556, 563 (7th Cir.2005) ("this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Sosnovskaia v. Gonzales,* 421 F.3d 589, 594 (7th Cir.2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); *Soumahoro v. Gonzales,* 415 F.3d 732, 738 (7th Cir.2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); *Grupee v. Gonzales,* 400 F.3d 1026, 1028 (7th Cir.2005) (the immigration judge's unexplained conclusion is "hard to take seriously"); *Kourski v. Ashcroft,* 355 F.3d 1038, 1039 (7th Cir.2004) ("there is a gaping hole in the reasoning of the board and the immigration judge"); *Niam v. Ashcroft,* 354 F.3d 652, 654 (7th Cir.2003) ("the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases"). Other circuits have been as critical. *Wang v. Attorney General,* 423 F.3d 260, 269 (3d Cir.2005) ("the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding"); *Chen v. U.S. Dep't of Justice,* 426 F.3d 104, 115 (2d

> Cir.2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"); *Fiadjoe v. Attorney General,* 411 F.3d 135, 154-55 (3d Cir.2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor v. Gonzales, 405* F.3d 1049, 1054 (9th Cir.2005) ("the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture"); *Korytnyuk v. Ashcroft,* 396 F.3d 272, 292 (3d Cir.2005) ("it is the [immigration judge's] conclusion, not [the petitioner's] testimony, that 'strains credulity' ").

Id. at 829. The Court concluded with "the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* at 830.

In the case at bar, the exploitation of Mr. Meza's credibility fits within the cases cited above, but the Tenth Circuit failed to enforce "minimum standards of legal justice" for Mr. Meza, allowing the immigration judge to toy with credibility. The rule of law is plain: the "alien shall have a reasonable opportunity . . . to present evidence." 8 U.S.C. § 1229a(b)(4)(B). Likewise, the immigration judge "shall receive and consider material and relevant evidence." 8 C.F.R. § 1240.1(c). Mr. Meza was allowed to present his testimony, but it was never deemed credible nor incredible, rather it was exploited.

This was unreasonable. The judge selected some testimony to believe wholeheartedly, without a scintilla of corroboration – even over the cautionary remarks of government counsel – so long as that selection could be used against Mr. Meza. This was regarding Mr. Meza's so-called

"voluntary departure" or "voluntary return" to Mexico for two days in 1995 – for which the government produced no record. App. 28.

Mr. Meza's other testimony, regarding his *continuous presence,* including the years he lived in Chicago, and the medical *hardship* to his U.S. citizen children if forced to live in Mexico, was tacitly deemed unworthy of belief, even where some written corroboration was in evidence and the government had not cross-examined on these points. App. 18-26.

For example, the Meza children had medical problems: "his daughter had problems with her ears, but he indicated that she was able to hear. . . . his son recently suffered a liver infection and had pneumonia the year before." App. 3. The immigration judge held that Mr. Meza had not "shown that the medication and follow-up visits would be unavailable in Mexico." App. 4. Yet, Mr. Meza testified to the opposite:

> Q: Would your children be able to receive medical care in Mexico?
>
> A: If I don't have the money, no.
>
> Q: Would you be able to find work in Mexico?
>
> A: It was very difficult to find a job now.
>
> Q: Do you know if there's any doctor that would check your daughter's ears for free?
>
> A: In Mexico?
>
> Q: Yes.
>
> A. No.

> Q: And would there be any clinic or doctor that could check your son's chest or lungs without cost?
>
> A: No

App. 25-26. This testimony, if deemed credible, showed that the Meza children would not have the medical care they needed in Mexico. Yet the immigration judge conveniently made no credibility finding.

The credibility decision in the Meza case was performed tacitly by the immigration judge. Once exposed, such a "procedure" would require rationalization. Why was some negative testimony believed and some other positive testimony disbelieved? No explanation was provided or required, either by the immigration judge, the Board of Immigration Appeals or the Tenth Circuit, which, in Mr. Meza's case, failed to enforce "minimum standards of legal justice," holding that his due process claim was "without merit." Appendix at 7-8. Other Courts of Appeals would take a different view, as outlined in *Benslimane.*

CONCLUSION

Mr. Meza was a poor Mexican family man who came before the immigration judge in order to apply for cancellation of removal. *He offered his testimony for evidence,* along with some corroboration. The immigration judge manipulated Mr. Meza's testimony, selecting one negative part to believe and other positive parts to disbelieve, without ever making a credibility finding. Ironically, the portion the immigration judge selected to believe was uncorroborated. The favorable part of the testimony which the immigration judge disbelieved was corroborated. Such

a tacit credibility "procedure" was never explained because it was irrational. Mr. Meza's removal hearing fell below "minimum standards of legal justice." The Tenth Circuit panel found Mr. Meza's due process claim "without merit," but also failed to explain how such a tacit credibility "procedure" satisfied due process. Other Courts of Appeals (the Second, Third, Seventh and Ninth) have required "minimum standards of legal justice" in removal hearings. These Courts would have required some explanation for the tactics of the immigration judge. Therefore, this Court should resolve the conflict among circuits, setting a standard for removal hearings.

For these reasons, Mr. Meza respectfully requests this Court accept the Writ and resolve this important and recurring matter.

Wherefore, Petitioner, Benito Meza-Hernandez, respectfully submits his Writ of Certiorari this 15th day of May, 2007.

Respectfully submitted,

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2007 WL 466281

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BENITO MEZA-HERNANDEZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General; DOUGLAS MAURER, Field Office Director, Immigration and Customs Enforcement, Department of Homeland Security,*

Respondents.

No. 06-9523
(BIA No. A73 375 431)
(Petition for Review)

ORDER AND JUDGMENT**

Before **HOLMES**, **McKAY**, and **BRORBY**, Circuit Judges.

(Filed February 14, 2007)

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* Pursuant to Fed. R. App. P. 43(c)(2), Douglas Maurer is substituted for Michael Comfort as an appellee in this action.

** After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

This petition for review, initiated in the district court as a petition for habeas relief and later transferred to this court pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311, challenges the denial by the Board of Immigration Appeals (BIA) of petitioner's application for cancellation of removal. As explained below, we DISMISS in part and DENY in part the petition for review.

Background:

Petitioner Benito Meza-Hernandez (Meza) was served with a notice to appear on February 18, 1998. He conceded removability and filed an application for cancellation of removal under 8 U.S.C. § 1229b. Section 1229b(b)(1) requires the alien to satisfy four criteria, two of which are relevant here. The alien must establish (1) his continuous physical presence in the United States for a period of not less than ten years, and (2) that his removal "would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 1229b(b)(1)(A), (D).

Regarding the "continuous physical presence" requirement, Meza claimed that he had lived in the United States continuously since 1987, first in Chicago, Illinois, and then in Colorado. At his removal hearing he admitted that he had been arrested by the INS in 1995. He remained in custody for nine days, after which he paid $70 to return to Mexico on his own. Meza testified further that he returned to the United States after staying in Mexico for only two days. With respect to the "hardship" requirement, Meza claimed that, if he were removed, his two

minor children, who are United States citizens, would be required to return with him to Mexico. Based on their medical conditions, he asserted that his removal would result in exceptional and extremely unusual hardship to the children. At the removal hearing, Meza testified that his daughter had problems with her ears, but he indicated that she was able to hear. He also testified that his son recently suffered a liver infection and had pneumonia the year before. Meza stated that the family had no home to go to in Mexico and he would have difficulty finding a job there. He asserted there would be no free medical care in Mexico and he would not have money to pay for medical treatment for his children.

The immigration judge (IJ) issued an oral decision, holding that Meza failed to establish either that his removal would result in exceptional and extremely unusual hardship to the children, or that he had been continuously present in the United States for at least ten years. The IJ also denied Meza's request for voluntary departure,[1] based upon a conclusion that Meza was previously granted voluntary departure in 1995, after which he immediately returned to the United States.

Referring to Meza's testimony regarding hardship to his children, the IJ concluded:

> Although he alleges medical problems, he has not proven any and if what he says is true concerning these medical problems, he certainly has not

---

[1] Voluntary departure is a form of statutory relief, by which the Attorney General may permit an alien voluntarily to depart the United States at his own expense, in lieu of being subject to, or before the completion of, removal proceedings. 8 U.S.C. § 1229c(a)(1).

> shown that the medication or follow-up visits would be unavailable in Mexico or that these conditions would be exacerbated by the living conditions in Mexico. Moreover, the children are young. The daughter is in the early grades of school. They are from a Spanish-speaking household. I cannot find that they would suffer this type of hardship taking into account the privations they might suffer from living in Mexico because of the decreased standard of living and the medical condition also.

Admin. R. at 96-97. Regarding continuous physical presence, the IJ concluded that Meza failed to produce objective evidence of his presence in the United States during the first three years that he alleged. Although Meza testified he lived in Chicago beginning in 1987, the IJ rejected as incompetent evidence a letter purporting to confirm his employment during that time. As an alternative ground for holding that Meza failed to establish ten years' continuous physical presence, the IJ determined that Meza's return to Mexico in 1995 was a voluntary departure that interrupted his physical presence, such that Meza began to accrue time once again upon his return to the United States. *Id.* at 96.

On appeal to the BIA, Meza challenged the IJ's determinations on the continuous physical presence and hardship issues. He argued that the IJ erred in concluding that his return to Mexico in 1995 – which Meza also characterized as a voluntary departure in his brief to the BIA – severed his continuous presence. He also contended that the IJ's decision was procedurally defective because the IJ failed to make explicit credibility determinations with respect to Meza's testimony regarding the period of time he claimed to have lived in Chicago and regarding his

children's medical problems. Meza therefore sought a remand in order to allow the IJ to make the missing credibility findings. The BIA affirmed per curiam, without opinion. Meza then filed a federal habeas petition, which the district court subsequently transferred to this court pursuant to the REAL ID Act of 2005.

Discussion:

Meza raises the same issues in his opening brief that he argued in his appeal to the BIA. He also adds a new argument – which he did not make to the BIA – that the IJ erred in finding that he was granted voluntary departure in 1995 and then improperly used that erroneous finding to disqualify him for a first voluntary departure in 1999.

Where the BIA summarily affirms an immigration judge's decision, this court reviews the IJ's analysis as if it were the BIA's. *Wiransane v. Ashcroft,* 366 F.3d 889, 897 (10th Cir. 2004). But we must first determine the extent of our jurisdiction to review the issues raised in Meza's petition. This court has jurisdiction to determine its jurisdiction. *Latu v. Ashcroft,* 375 F.3d 1012, 1017 (10th Cir. 2004). "The [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)] altered the availability, scope and nature of judicial review" in immigration cases.[2] *Morales Ventura v. Ashcroft,* 348 F.3d 1259, 1261 (10th Cir. 2003) (quotation omitted). Our review of the IJ's determination that Meza failed to establish "exceptional and extremely unusual hardship" under 8 U.S.C.

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[2] Because the notice to appear was served after April 1, 1997, IIRIRA's permanent rules govern this case. *See Morales Ventura v. Ashcroft,* 348 F.3d 1259, 1261 (10th Cir. 2003).

§ 1229b is precluded by 8 U.S.C. § 1252(a)(2)(B)(i), unless Meza raises "constitutional claims or questions of law." *Id.* § 1252(a)(2)(D); *see also Schroeck v. Gonzales,* 429 F.3d 947, 951 (10th Cir. 2005).

Meza argues that the IJ failed to make an explicit credibility finding on the hardship issue, and instead implicitly found his testimony not credible. He asserts that this argument raises a question of law because the IJ and the BIA acted ultra vires – first in the IJ's failure to make an adverse credibility determination, and then in the BIA's failure to remand for that determination or alternatively apply a rebuttable presumption of Meza's credibility on appeal. For this proposition, Meza relies on case law from the BIA, this circuit and other circuits in the context of applications for asylum, as well as on certain language in 8 U.S.C. § 1229a(c)(4)(C) ("There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.").

This court has construed the term "questions of law" in § 1252(a)(2)(D) to include "a narrow category of issues regarding statutory construction." *Diallo v. Gonzales,* 447 F.3d 1274, 1282 (10th Cir. 2006) (quotation omitted). In so holding, we rejected a broader interpretation that would grant jurisdiction to review "all claims having a legal dimension." *Id.* at 1281. Here, Meza does not raise a statutory construction issue with respect to the IJ's discretionary hardship determination. His argument that the IJ and BIA failed to correctly apply case law does not fall within our narrow construction of "questions of law" under *Diallo.* Although Meza invokes language in 8 U.S.C. § 1229a(c)(4)(C), that provision applies only to aliens who applied for relief on or after May 11, 2005, the effective

date of the REAL ID Act. *See Yan v. Gonzales,* 438 F.3d 1249, 1251 n.3 (10th Cir. 2006). Meza submitted his application seeking cancellation of removal in 1998. Consequently, we conclude that Meza raises no question of law over which this court has jurisdiction with respect to the IJ's determination that he failed to establish exceptional and extremely unusual hardship.

This court does have jurisdiction to review a constitutional claim raised by Meza. *See Brue v. Gonzales,* 464 F.3d 1227, 1232 (10th Cir. 2006) (exercising jurisdiction to review petitioner's due process claim). He argues that "[t]he failure to credit or to discredit the medical hardship testimony was tantamount to unlawfully suppressing it, which in turn violated the evidentiary rules that apply in removal proceedings." Pet'r Br. at 56. Meza asserts that this error rises to the level of a procedural due process violation, because "[t]he cumulative effect of the ultra vires acts by the IJ and the BIA denied Mr. Meza a 'fair immigration proceeding.'" *Id.* at 62. We disagree.

Procedural safeguards in immigration proceedings "are minimal because aliens do not have a constitutional right to enter or remain in the United States." *Schroeck,* 429 F.3d at 952 (quotation omitted). Aliens facing removal proceedings are entitled only to procedural due process providing "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (quotation omitted). Here, Meza was not denied an opportunity to present his case. The IJ accepted and considered all of Meza's proffered testimony on the issue of exceptional and extremely unusual hardship to his children. Meza's contention that he was denied constitutional due process because the IJ made an implicit, rather than an explicit, credibility determination regarding the hardship issue is without

merit. Nor has he established that a remand to require the IJ to make his credibility determination explicit would have changed the result in this case. Thus, Meza's failure to prove prejudice also leads us to reject his due process claim. *See Duran-Hernandez v. Ashcroft,* 348 F.3d 1158, 1162 (10th Cir. 2003) (rejecting due process claim because of alien's failure to prove prejudice resulting from challenged procedures).

Because Meza must satisfy all four criteria in § 1229b(b)(1) in order to be eligible for cancellation of removal, our rejection of his due process challenge to the IJ's hardship determination also moots his challenge to the IJ's holding that he failed to establish ten years' continuous physical presence in the United States. *See Morales Ventura,* 348 F.3d at 1262 (holding that lack of jurisdiction to review challenge to hardship determination mooted challenge to continuous presence determination). "As this challenge is moot, we have no jurisdiction to resolve it." *Id.* We therefore dismiss this portion of Meza's petition.

Finally, Meza argues that the IJ erred in finding that he was granted a statutory voluntary departure in 1995. He asserts that the IJ improperly relied upon this erroneous finding to preclude him from being eligible for a first voluntary departure following denial of cancellation of removal in 1999. Meza made this argument for the first time in his habeas petition. Because Meza failed to raise this issue in his appeal to the BIA, we lack jurisdiction to review it. *See Rivera-Zurita v. INS,* 946 F.2d 118, 120 n.2 (10th Cir. 1991) (holding failure to raise issue on appeal to BIA constitutes failure to exhaust administrative remedies and deprives appellate court of jurisdiction). Thus, we

dismiss as well this portion of Meza's petition for lack of jurisdiction.

Conclusion:

The petition is DISMISSED in part for lack of jurisdiction. The remainder of the petition is DENIED.

Entered for the Court

Wade Brorby
Circuit Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-375-431 – Denver Date: Apr. 23, 2002

In re: MEZA-HERNANDEZ, BENITO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Salvator, Jim, Esquire

ON BEHALF OF SERVICE: Douglas Bow

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

/s/ Edward Grant
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Denver, Colorado

File No.: A 73 375 431 February 8, 1999

In the Matter of BENITO MEZA-HERNANDEZ Respondent	IN REMOVAL PROCEEDINGS

CHARGE: Entry without inspection.

APPLICATIONS: Cancellation of removal.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Jim Salvator, Esquire	Elizabeth Posont, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is 31 years old, a native and citizen of Mexico. A Notice to Appear was issued on February 18, 1998 charging him with entry without inspection in October 1996 at Nogales, Arizona. The respondent suggested that he had actually been in the United States since 1987, and so the Notice to Appear was amended. He has admitted and conceded.

He has applied for cancellation of removal. To qualify, he must show that he has been physically present continuously in the United States for at least 10 years, that he has been a person of good moral character, and he must show that removal from the United States would cause exceptional and extremely unusual hardship to certain

family members. Those family members are spouses, parents or children who are U.S. citizens or permanent resident aliens. In this case members of that class include his two U.S. citizen children.

The respondent testified that after entering the United States in 1987, he lived in Chicago for three years and then came to Colorado. There are no tax returns or financial records to show his residence in Chicago. However, there is a letter in the file from a Mr. Martinez stating that respondent was employed by Morgan Marshall Industries in Chicago from 1987 to December 1990. It is not on company letterhead and there is nothing to indicate who this Mr. Martinez is. In fact, it appears that it is an Ernestine Martinez who is also the notary in the case.

When he came to Colorado he worked in the mines for a while and for four years worked at a ranch. There is a very good reference in the file from Ms. Alexandra Butler who states that the respondent is a person of good character who is family oriented and takes good care of his wife and children.

The respondent married Arcelia Meza in 1990, according to his application. She was born in Mexico and undocumented. They have two children, Carina, age seven and Miguel, age one.

The respondent testified that Carina had ear surgery at one year old and still sees the doctor on occasion and is medicated. Miguel had some type of a liver infection and was in the hospital for four days last year and goes for monthly checkups. There is no medical evidence as to exactly what the situation is for either child.

He stated that on brief occasions in 1995 and last year, his family received food stamps that first time and also last year apparently.

He stated that if he returned to Mexico, he would have no home to go to [and /s/ JPV] it would be very difficult to go to find work. He has only a fifth-grade education and he thinks it would be extremely difficult to support his family. He noted there are no free clinics to take care of his children's medical condition.

He claims he was arrested for shoplifting in 1996 and paid a small fine.

In October 1995, he was returned to Mexico under a grant of voluntary departure, administratively[. He /s/ JPV] paid for his $70 ticket, spent two days in Mexico, and returned to the United States.

I make the following conclusions. First, I find the respondent has not established 10 years of continuous physical presence. First, there is no objective evidence to show the first three years in the United States. The letter from the individual in Chicago is insufficient to show that he worked at a company for that time. There is no attribution as to who that person is who signed it. It is not on company stationery and there are no contemporaneous employee records to show that he worked there. Secondly, the statute does not say that an individual can be out of the United States for a brief time on an innocent, causal or brief departure as previous statutes. However, I find that if an individual is granted voluntary departure and returns, that is an important interruption of his physical presence and his immigration status. I believe that it is only logical that he has to start his 10 years all over again

upon returning to the United States. And I find that for that reason, he has not shown his 10 years.

As to extreme hardship, the respondent has not shown extremely unusual hardship to his children. The exact wording of the statute is exceptional and extremely unusual hardship. Although he alleges medical problems, he has not proven any and if what he says is true concerning these medical problems, he certainly has not shown that the medication or follow-up visits would be unavailable in Mexico or that these conditions would be exacerbated by the living conditions in Mexico. Moreover, the children are young. The daughter is in the early grades of school. They are from a Spanish-speaking household. I cannot find that they would suffer this type of hardship taking into account the privations they might suffer from living in Mexico because of the decreased standard of living and the medical condition also.

Since the respondent was previously granted voluntary departure three years ago and came back immediately, I find that as a matter of discretion he should not be granted voluntary departure again.

ORDER

IT IS ORDERED that the respondent be removed to Mexico.

/s/ JP Vandello
JAMES P. VANDELLO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JAMES P. VANDELLO

in the matter of:

BENITO MEZA-HERNANDEZ

A 73 375 431

Denver, Colorado

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Karen Silva
(Karen Silva, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

April 16, 1999
(Completion Date)

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of		File A 73 375 431
BENITO MEZA-HERNANDEZ	)	IN REMOVAL PROCEEDINGS
Respondent	)	Transcript of Hearing

Before JAMES P. VANDELLO, Immigration Judge

Date: February 8, 1999 Place: Denver, Colorado

Transcribed by DEPOSITION SERVICES, INC. At Rockville, Maryland

Official Interpreter: Alicia Boyer

Language: Spanish

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Elizabeth Posont, Esquire	Jim Salvator, Esquire

* * *

[4] JUDGE FOR RECORD

This is a continued hearing concerning Mr. Meza-Hernandez.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR RECORD

At Denver, Colorado, February 8th, '99, Judge Vandello.

JUDGE TO MR. SALVATOR AND MS. POSONT

Q. Appearances?

MR. SALVATOR TO JUDGE

Q. Jim Salvator for Mr. Meza who is present.

MS. POSONT TO JUDGE

Q. Elizabeth Posont for the Service.

JUDGE FOR RECORD

The language is Spanish and the interpreter is Alicia Boyer.

JUDGE TO MR. MEZA

Q. Good afternoon, sir. Would you please stand and raise your right hand while I swear you in? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, I do.

Q. Thank you. Be seated.

JUDGE TO MS. POSONT

[5] Q. So I have received the application for cancellation with a few documents attached and I will admit the packet as Exhibit 2. Does the Service have any objection to the materials with it?

A. No objection.

JUDGE FOR RECORD

And so they will be included with that.

MS. POSONT TO JUDGE

Q. Your Honor, may I state for the record that the fingerprints were returned on July 17, '98 and they are clear.

A. Thank you.

JUDGE TO MR. SALVATOR

Q. Counsel, you may proceed with your case.

A. Thank you.

MR. SALVATOR TO MR. MEZA

Q. Sir, you name is Benito Meza?

A. Yes. My name is Benito Meza.

Q. And you were born on January 16th, 1968?

A. Yes.

Q. And that was in Guanajuato, Mexico?

A. Yes.

JUDGE FOR RECORD

And we'll spell that. G-U-A-N-A-J-U-A-T-O. One word.

MR. SALVATOR TO MR. MEZA

[6] Q. And you came to the United States in 1987?

A. Yes.

Q. And do you remember what date you came to the United States in 1987?

A. In November.

Q. Since that time, have you lived continuously in the United States?

A. Yes.

Q. And where did you first live when you came to the United States?

A. Chicago.

Q. And how long did you live in Chicago?

A. Three years.

Q. And after Chicago where did you go?

A. Here in Colorado.

Q. And so have you lived here in Colorado since the time you moved from Chicago?

A. Yes.

Q. And since you've entered the United States, have you been employed?

A. Yes.

Q. What was the first type of work that you did?

A. In the manufacturing.

Q. And what kind of work did you do in the factory?

[7] A. I don't know how you say it. It's something that you – juice in the stores.

Q. And how long did you work at this factory?

A. In 1987 until 1990.

Q. And then after 1990 where did you work?

A. Then I moved here.

Q. And what kind of work did you do here in Colorado?

A. I did work in a mine cleaning.

Q. And how long did you work in a mine?

A. All of the summer, in the summer.

Q. And then after the mine, where did you work?

A. I did work in a ranch.

Q. And how long have you worked on a ranch?

A. I worked four years at the ranch.

Q. Have you always been employed in the United States?

A. Yes.

Q. Have you received any welfare?

A. No.

Q. Have your children received any welfare?

A. Yes.

Q. In what years did your children receive welfare?

A. In 1995 they did receive for about two months.

[8] Q. And when you say they receive, was it food stamps?

A. Yes.

Q. And was there any other kind of assistance or welfare that your family received?

A. Yes. Last year they were receiving food stamps, $200 for these children.

Q. Besides the $200 last year, did you receive any other benefits last year for your children?

A. No. Nothing.

Q. And are you married?

A. Yes.

Q. What is your wife's name?

A. Arcelia.

Q. And where was Arcelia born?

A. In Mexico.

JUDGE TO MR. SALVATOR

Q. And counsel, can you spell her name please?

A. A-R-C-E-L-I-A.

Q. Thank you.

MR. SALVATOR TO MR. MEZA

Q. Arcelia was born in Mexico?

A. Yes.

Q. Are you formally married with Arcelia?

A. Yes.

[9] Q. Okay. And is Arcelia here legally in the United, States?

A. No.

Q. Okay. Now, who are your children?

A. Miguel Angel.

Q. And how old is Miguel?

A. One year.

Q. And who is your other child?

A. Carina.

Q. And how old is Carina?

A. She will be turning seven on the 6th of March.

Q. And were Miguel and – sorry – Carina born in the United States?

A. Yes.

Q. And how is the health of Carina?

A. She was born normal, but when she was approximately a year old she had to have ear surgery.

Q. And how are her ears now?

A. We had to take her to a doctor the other day because she had some problem with her ears.

Q. Is she able to hear?

A. Yes.

Q. And when you went to the doctor the other day, do you know what the doctor said?

A. He gave medication.

[10] Q. Do you know what the medication was?

A. No.

Q. Did the doctor ask Carina to go into the hospital?

A. No. He only prescribed some medication.

Q. Is Carina in school?

A. Yes.

Q. Is she in school today?

A. Yes.

Q. And does Carina speak English?

A. Yes.

Q. How is she doing in school?

A. Fine.

Q. Okay. And how is Miguel's health?

A. Now he's fine. The other day we had to take him to the doctor because he had an infection in the chest.

Q. And when was the last time that you took him to the doctor for his infection?

A. Last week.

Q. And what did the doctor tell you?

A. That he have an infection in the liver.

Q. And did the doctor give you any medicine for Miguel?

A. Yes.

Q. And did Miguel need to go into the hospital?

[11] A. No. He had a lot of coughing. It seemed that what was the using or make the infection.

Q. Has Miguel other than when he was born, has Miguel been in the hospital?

A. Yes.

Q. And when was that?

A. It was in March like a Sunday, the 4th of March.

Q. And why was he in the hospital? Is this last year?

A. He had pneumonia.

Q. And was that in March of 1998?

A. Yes. Last year.

Q. And how long was he in the hospital?

A. Four days.

Q. Since that time has he gone back to the hospital?

A. Only to check him every month.

Q. Okay. And does the doctor check him every month?

A. He was being checked once a month and that he be (indiscernible) the 26th of January.

Q. And after the 26th of January, will he still need to be checked every month?

A. Who knows?

[12] Q. And when did the doctor want Miguel to come back and see him?

A. I don't know. It is my wife the one that make the appointments.

Q. If you were ordered to return to Mexico, would you bring your children with you?

A. Excuse me. (Indiscernible). In Mexico there's nothing and close by for the girl and there wasn't – there is anything that I could do there.

Q. If you had to return to Mexico, would you take your children with you?

A. What else can I do?

Q. Would your children be able to receive medical care in Mexico?

A. If I don't have the money, no.

Q. Would you be able to find work in Mexico?

A. It was very difficult to find a job right now.

Q. Do you know if there's any doctor that would check your daughter's ears for free?

A. In Mexico?

Q. Yes.

A. No.

Q. And would there be any clinic or any doctor that could check your son's chest or lungs without cost?

A. No.

[13] Q. Have you had any trouble with the police here in the United States?

A. Only one time that I had a crash.

Q. Was anyone hurt in the crash?

A. No.

Q. Did you have to pay any money?

A. $1,000.

Q. And did you pay that?

A. No. My insurance did.

Q. Okay. When was that?

A. In 1993.

Q. Any other problems with the law?

A. I had an incident where I went to the store. And I was trying to put my baby in the car and then went outside the store. My wife was purchasing some things. Then she was making – she was paying for it and then somebody came and accused me of robbing some cigarettes.

A. I had some cigarettes and my wife went to pay for it, but first I wanted to put the baby in the car. And then when I did come back I was arrested.

Q. Do you know what you were charged with?

A. No. I did go to court though.

Q. Did you pay a fine?

A. Yes.

Q. When was that?

[14] A. In 1996.

Q. Okay. If you return to Mexico with your children, do you believe that your children would be able – would remain healthy?

A. No. I don't believe so. It's very hard in Mexico.

Q. Do you have any home or anywhere to live there?

A. In Mexico?

Q. Yes.

A. I don't have a home. I don't have nowhere to live there.

Q. If you had to return to Mexico with your children, where would you go?

A. I would have to find a place to arrive.

Q. How many years have you been in school?

A. In Mexico?

Q. Anywhere.

A. In Mexico, fifth grade.

MR. SALVATOR TO JUDGE

Q. I don't have any further questions, Your Honor.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MR. SALVATOR

Q. Thank you.

JUDGE TO MR. MEZA

[15] Q. Mr. Meza, the Government attorney, Mr. Posont, may have a few questions for you.

A. Okay.

MS. POSONT TO MR. MEZA

Q. Does your daughter Carina speak Spanish?

A. Yes.

Q. Were you arrested by Immigration in October of 1995?

A. Yes.

Q. Did you pay $70 to go back to Mexico on the bus on your own?

A. Yes.

Q. How many days were you in the Immigration jail here in Denver?

A. Nine.

Q. Nine days?

A. Yes.

Q. How long did you stay in Mexico before you came back?

A. Two days.

Q. You may have answered this, but what family does your wife have in Mexico?

A. In Mexico?

Q. Yes.

A. His mother and father who are there wants to [16] come here.

INTERPRETER TO JUDGE

Q. Excuse me, Your Honor.

(OFF THE RECORD)

(ON THE RECORD)

MS. POSONT TO JUDGE

Q. Your Honor, that concludes the Service's questions. I did want to make a brief statement as to the effect of the voluntary return. Under the old law there were cases that suggested that this was a break in brief, innocent and casual – the coming back illegally after a voluntary return.

But it's not clear under the new law whether the new 90-day standard is intended to replace brief, innocent and casual and I'm not ready to try that argument out in this case that the VR has broken his 10 years. The Service's argument rather is that the exceptional and extremely unusual hardship element has not been met.

JUDGE TO MS. POSONT

Q. Thank you.

JUDGE TO MR. SALVATOR

Q. Anything else, counsel?

A. No, sir.

JUDGE TO MR. MEZA

Q. Now, sir, you said that your son had a liver [17] infection. Did you mean liver or did you mean lungs?

A. They told me the liver.

Q. I see. All right. And did he have the lung problems too?

A. No.

Q. All right. And how many years has Arcelia been in the United States?

A. Since 1991.

Q. Thank you.

JUDGE FOR RECORD

I'll give my decision.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. SALVATOR

Q. Did you wish to reserve appeal, counsel?

A. Yes, sir.

Q. Your appeal deadline is 30 days which is March 10th.

JUDGE TO MS. POSONT

Q. And the Service?

A. No appeal.

JUDGE FOR RECORD

Hearing closed.

HEARING CLOSED